Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1996

CORTEZ T. BRIDGES
Petitioner

versus

CITY OF BOSSIER
Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED FOR REVIEW

Whether a person who has been cateforically rejected for the jobs of firefighter, paramedic and emergency medical technician because he suffers a mild form of hemophelia is "disabled" within the Americans With Disabilities Act and thus entitled to an individualized assesment of his ability to do the jobs in question.

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Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Petitioner Cortez T. Bridges respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 22, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 92 F.3d 329 and appears in Appendix A to the petition. The unreported opinion of the Western District of Louisiana appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was rendered on

August 22, 1996. This Court's jurisdiction is invoked under 28 U.S.C. §1254(a).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED IN THE CASE

Americans With Disabilities Act

Definitions (42 U.S.C. § 12102)

As used in this Chapter:

The term "disability" means, with respect to an individual—

(A) a physicial or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * *

As used in this subchapter: (42 U.S.C. § 12111)

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this Title, consideration shall be given to the employer's judgment as to what functions of a

job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * *

Discrimination (42) U.S.C. § 12112)

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Regulations of the Equal Employment Opportunity Commission

29 C.F.R. § 1630.2(j)(3)(i)

"[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."

STATEMENT OF THE CASE

Cortez Bridges sought work as a paramedic with Bossier City, Louisiana where he lived. Bossier City requires all paramedics and emergency medical technicians employed by the city to qualify as firefighters.[1] Bridges applied for a firefighter position, passed the civil service examination and was offered a position contingent on the results of a physicial examination. As part of the physical, Bridges filled out a medical history form in which he revealed that he has a blood clotting disorder known as Factor IX Deficiency, a form of hemophilia. Bridges has the mildest form of hemophilia. Mild hemophiliacs do not suffer spontaneous or uncontrolling bleeding but are at somewhat greater risk of increased bleeding as a result of trauma. (Memo. 3)[2] Despite Bridges' assurances that he had led a normal, active life and had never suffered complications as a result of his condition, the examining physicial recommended that Bridges not be hired because of the risk of trauma associated with the firefighter position. (Tr. 25-36) Acting on that recommendation, the City rejected Bridges' application. (Tr. 34-36; Memo. 1) Rejection as a firefighter precluded Bridges employment as a paramedic.[3]

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[1] *Bridges v. City of Bossier*, 92 F.3d 329, 335 n.9 (5th Cir. 1996).

[2] References to findings of fact made by the district court in its June 30, 1995 Memorandum Ruling will be designated as "Memo.____." The Memorandum Ruling is reproduced in the Appendix. References to the trial transcript in the appellate record and will be designated "Tr.____" and references to documents in the record will be designated "R.____." Page references are to page numbers as they appear in the record to the Court of Appeals.

[3] "[I]t is clear that disqualification from the job as firefighter also acted as a disqualification from the jobs of EMT and paramedic with the City because the City has a rule requiring all EMTs and paramedics to be firefighters as well." *Bridges v. City of Bossier, supra*, 92 F.3d at 335 n.9.

Bridges filed suit in the Western District of Louisiana against Bossier City under the Americans With Disabilities Act.

In a bench trial, Bridges proved that he had led a completely normal life unhindered by his blood condition. He had played competitive contact sports while in high school. After graduation from high school, Bridges joined the Louisiana National Guard and successfully completed boot camp and summer training sessions without incident or special accommodation by the Guard. (Memo. 1-2) During his entire life Bridges has never suffered from uncontrollable bleeding or had any kind of medical emergency resulting from his blood condition. In addition to sustaining the normal bruises and cuts while growing up, Bridges twice had major surgery. On no occasion has he ever bled excessively. (Memo. 3-4) Medical experts testified that, given his medical history, any trauma sufficient to cause Bridges to suffer a bleeding incident would also be sufficient to require emergency medical attention to persons with normal blood. (Tr. 238)

Bridges claimed that the City failed to conduct an individualized assessment of his ability to perform as a firefighter or paramedic and based its decision to reject him on stereotypes and assumptions about hemophilia.[4] The City argued that Bridges was not otherwise qualified for work as a firefighter because of the risk of trauma associated with firefighting work.[5] The City also contended that Bridges was

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[4] Bridges contended that the City did not understand the different types of hemophilia and rejected him because it misunderstood the nature of his ailment. The mild form of hemophilia from which Bridges suffers is the rarest form of the condition. Severe hemophilia is much more common. (Memo. at 2-3)

[5] The district court found, "[t]he City rejected plaintiff because it feared his condition rendered him a danger to himself and others if employed as a firefighter. At trial, the City repeatedly cited his potential for excess bleeding secondary to trauma as the source of this danger." (Memo. 1).

not "disabled" within the meaning of the ADA. The district court never reached the issue of whether Bridges was in fact qualified for firefighter work because it conclusion that he had not shown himself to be "disabled" and thus could make no claim under the ADA. The court's conslusion rested on its finding that the City regarded Bridges as only disqualified from jobs involving "routine exposure to extreme trauma" and that such restriction did "not impose a substantial limitation on plaintiff's ability to work in general." (Memo. 7-8) Thus Bridges had failed to prove that he was disabled within the meaning of the ADA because the City did not regard him as having a substantially limiting impairment of his ability to work.

The Court of Appeals for the Fifth Circuit affirmed.

> The legal issue presented by the instant case is whether disqualification from jobs involving routine exposure to extreme trauma — such as firefighter — constitutes a substantial limitation on the major life activity of working. Because we agree with the district court that such jobs are merely a narrow range of jobs, we hold that one who is disqualified from holding such jobs is not disabled under the ADA.

939 F.3d at 334. Appendix A at 8.

REASONS FOR GRANTING THE WRIT

Cortez Bridges was denied a position as a firefighter without any kind of individualized evaluation of his ability to do the job. The City regarded Bridges as unqualified because it considered any person with any form of hemophilia, no matter how mild and no matter what its

actual effect on the individual, to be unqualified for any line position in the fire department including firefighter, EMT, paramedic or, indeed, any position with exposure to trauma. This kind of across-the-board discrimination on the basis of blanket assumptions about physicial abnormalities is exactly the kind of discrimination Congress sought to prohibit in the Americans With Disabilities Act. The holding in this case results from an overly narrow and plainly incorrect construction, not of the ADA itself, but of EEOC Regulations designed to implement the law.

The ADA prohibits employment discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112(a). "Disability" is defined in the Act to include "a physical or mental impairment that substantially limits one or more of the major life activities" and "being regarded as having such an impairment." 42 U.S.C. §1202. The ADA's protection for individuals who are "regarded as" disabled is identical to a provision in the Rehabilitation Act. In *School Board of Nassau County v. Arline,* 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987), this Court explained Congress' purpose in including the "regarded as" language in the Rehabilitation Act. By adding that provision, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284. In passing the ADA, Congress reaffirmed *Arline's* holding that "discrimination on the basis of mythology was "precisely the type of injury [the "regarded as" provision] sought to prevent." See *e.g.,* H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 53 (1990); H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 30 (1990). The ADA thus prohibits employers from rejecting applicants on the basis of physical or mental abnormalities because of untested assumptions or fears about the limiting effects of the applicants' condition. The Act

instead requires employers to make individualized determinations of the applicant's condition and extent to which that condition actually limits the applicant's ability to do the job at issue.[6]

This case should have been decided by the district court's determination of whether Bridges was "qualified" within the meaning of the ADA for the job as firefighter or paramedic. Indeed, the case was tried on the assumption that the issue before the court was whether Mr. Bridges' blood condition would in fact create an unavoidable risk to him and to others were he to work as a firefighter.[7] The plaintiff presented substantial evidence of Bridges' normal life style and the very low danger posed by his hemophilia: the

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[6] The employment provisions of the ADA prohibit discrimination against a "qualified" individual with a disability" — an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §1211. The Act thus calls for a two-part inquiry. First, it must be determined whether the individual can perform the essential functions of the job. Second, if the court concludes that individual is not able to perform the essential functions of the job, it must then determine whether any reasonable accommodation by the employer would enable him to perform those functions. See, *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n. 17; 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (Describing litigation under Rehabilitation Act).

[7] In the Pretrial Order, defendant listed the "contested issues" as follows: "(a) Plaintiff is not a 'qualified individual with a disability;' (b) Plaintiff is not an individual with a 'disability;' (c) Even if the plaintiff is an individual with a disability, there is no 'reasonable accommodation' with which plaintiff can perform the essential functions of the employment position that he desires; (d) Even if the plaintiff is an individual with a disability, any accommodation by the City would impose an undue hardship on the City; (e) Even if the plaintiff is an individual with a disability, he was denied employment as a result of the application of a qualification standards, tests, or selection criteria that is job-related and consistent with business necessary; (f) The qualification standards of the defendant included a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." (R. II, 788)

defendant presented evidence of the particular dangers associated with firefighting and the potential for trauma which could cause bleeding. But the district judge never reached the essential question of whether Bridges' condition in fact disqualified him for the position because it concluded that as a matter of law Bridges' was not "disabled" within the meaning of the ADA. Misapplying EEOC regulations, the district court concluded that the City's rationale for rejecting Bridges (routine exposure to extreme trauma) disqualified him from only a "narrow range of jobs," a disqualification that did not render Bridges "disabled." The Fifth Circuit affirmed holding "that firefighting jobs — including firefighters and associated municipal paramedics or EMTs who must also serve as backup firefighters — is too narrow a field to describe a 'class of jobs' under 29 C.F.R. § 1630.2(j)(3)(i)." 92 F.3d at 336. Appendix A at 12.

The ADA defines "disabled" as being "substantially limited in one or more major life activities." The act provides no further definition of "substantially limited" or "major life activities." EEOC regulations state that "[m]ajor life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(I). Regarding the life activity of working, the regulations further provide that

> [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 11630.2(j)(3)(i).

Courts have generally held that an employee is not

"significantly restricted" regarding work if his handicap prevents (or is perceived to prevent) him from doing a particular task associated with a particular job. "The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." *Forrisi v. Bowen*, 794 F.2d. 931, 935 (4th Cir. 1986). See also, *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995) ("the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working.")

In this case Cortez Bridges was perceived as being unqualified for firefighting *in general*, as well as for the related positions of EMT and paramedic. The rationale for his disqualification — exposure to trauma and thus to excessive bleeding — if applied by other employers would certainly disqualify him from all firefighting, and emergency-response related work. Such jobs would certainly constitute a "class of jobs" within any ordinary construction of that term. The Fifth Circuit relied, however, on decisions from other circuits suggesting that disqualification from a *kind of work*, as opposed to a particular job, constitutes only disqualification form a narrow range of jobs and thus does not render one "disabled." In *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992), the court held that plaintiff's disability (an absence of sensation in the fingers of one hand) did not substantially limit him in a major life activity because he could not work as a fireman. Similarly, *in Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir. 1989) the Second Circuit held that the City did not regard and applicant for the police force to be disabled simply because he was found incapable of satisfying the singular demands of that particular job. In this case the Court of Appeals has carried the rationale of *Welsh* and *Daley* further than either the Tenth or Second Circuit did in those

decisions, for in those cases the plaintiff was disqualified from only a single kind, not a series of related jobs as in this case. Moreover, the rationale of the defendants in *Welsh* and *Daley* in disqualifying the plaintiffs were job-specific. The basis for the disqualification in *Welsh*, for example, would only apply to firefighting. By contrast, "routine exposure to trauma" would disqualify Bridges from any kind of emergency response work where exposure to trauma was possible.

In deciding how limiting an employer must consider an employee's impairment to be before the employer is held to consider the employee disabled, most circuits have given a more generous construction to the "class of jobs' language in the EEOC regulations than did the Fifth Circuit in this case. Those courts have emphasized that whether or not a person is disabled under the Act is an individualized inquiry in which the court must ask "whether the particular impairment constitutes for the particular person a significant barrier to employment." *Forrisi v. Bowen, supra,* 794 F.2d at 933. Factors to be considered include "the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training." *Jasany v. United States Postal Service,* 755 F.2d 1244, 1249 (6th Cir. 1985) As the district court noted in *E.E. Black v. Marshall,* 497 F.Supp. 1088, 1099 (D.Haw. 1980)

> A person for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to the employment, and is substantially limited in one of his major life activities.

Unlike the court below, most circuits have considered disqualification from a *type of work* to constitute disqualification from a "class of jobs" and thus to be substantially limiting. In *Gupton v. Commonwealth of Virginia,* 14 F.3d 203, 205 (4th Cir.), *cert. denied,* U.S. 115 S.Ct. 59, 130 L.Ed.2d 17 (1994), the Court of Appeals upheld dismissal of the plaintiff's Rehabilitation Act claim precisely because she had failed to show that her allergy "foreclosed her generally from obtaining jobs in her field." See also, *Fitzpatrick v. City of Atlanta,* 2 F.3d 112, 1126 (11 Cir. 1993) (assuming in dicta that those desiring to be firefighters would be substantially impaired in a major life activity if they were prevented from working as firefighters); *Forrisi v. Bowen, supra,* 794 F.2d at 935 (employer regards employee as substantially impaired if the impairment generally prevents employment in his chosen occupation of utility repairman); *Dutcher v. Ingalls Shipbuilding,* supra, 53 F.3d at 727 (plaintiff's disability did not prevent her from performing the "entire class" of welding jobs: restriction only prevented her from "functioning in a welding position requiring substantial climbing").

The Fifth Circuit's holding in this case that firefighting and related jobs which involve exposure to trauma do not constitute a "class of jobs" renders the term meaningless and will significantly interfere with enforcement of the ADA. The court's grudging construction of the EEOC regulations will mean, paradoxically, that those persons most likely to be victims of assumptions and myths about their handicaps — those who are handicapped not so much by their physical abnormalities but by others' perceptions of their conditions — will be those most likely denied the protections of the Act.

CONCLUSION

The courts below seized on the language of the EEOC regulations as if the regulations were the ADA itself. This focus on the specific language of the regulations while ignoring the remedial purposes of the very statute which the regulations were intended to implement resulted in a decision which is at odds with the core purpose of the ADA — individualized assessments of the abilities of individuals with real or perceived handicaps. The decision below conflicts with decisions of other circuits and illustrates the narrowest approach to the important issue of who may seek relief under the ADA. For these reasons a writ of certiorari should issue to review the judgment and decision below.

Respectfully submitted,

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APPENDIX A

CORTEZ T. BRIDGES, Plaintiff-Appellant,

v.

CITY OF BOSSIER, Defendant-Appellee.

No. 95-30756.

United States Court of Appeals

Fifth Circuit

92 F.3d 329

Aug. 22, 1996.

Appeal from the United States District Court for the Western District of Louisiana.

Before GARWOOD, HIGGINBOTHAM and BENAVIDES, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant Cortez Bridges (Bridges) appeals the district court's judgment, following a bench trial, denying his claim of discrimination under the Americans with Disabilities Act (ADA). We affirm.

Facts and Proceedings Below

Bridges applied for a firefighter position in Bossier City, Louisiana (the City). After passing certain preliminary tests, he was directed to undergo a physical exam. On the medical history form, he revealed to Dr. Mark Wilson that

he has a blood clotting disorder known as Factor IX Deficiency, a mild form of hemophilia. Bridges told Dr. Wilson that he had never suffered any serious complications from the blood disorder. After contacting Bridges' family physician and his hematologist, Dr. Wilson recommended that the City reject Bridges' application because of the extreme risk of severe trauma associated with being a firefighter. The City rejected Bridges because it feared his condition rendered him a danger to himself and others as a firefighter.

Bridges sued the City under the ADA. In a bench trial before the district court, Bridges presented evidence that he has never suffered any severe complications because of the hemophilia. This is true even though he played competitive contact sports in high school, currently serves in the Louisiana National Guard, and is now employed as an emergency medical technician (EMT) at a local casino. According to Bridges, the City failed to conduct an individualized assessment of his ability to work as a firefighter, acting instead on "myths, fears, and stereotypes" about hemophilia.[1] Bridges claims that, despite the fact that he could actually perform the job of firefighter, the City refused to hire him because it regarded him as being disabled. The City's refusal to hire him as a firefighter also results in Bridges' being ineligible to work for the City as an EMT or paramedic. In response, the City argues that, though it refused to hire Bridges because of his hemophilia, it did not regard him as having a "disability" as that term is defined under the ADA.

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[1] Bridges testified that Dr. Wilson stopped his physicial examination immediately when Bridges advised him of his hemophilia condition. Dr. Wilson testified that he conducted a complete exam of Bridges and conducted research regarding hemophilia prior to deciding to recommend that the City reject Bridges's application. We assume that the district court resolved this conflict in the evidence consistent with its judgment and express findings, and hence in favor of Dr. Wilson's testimony. Such a resolution is not clearly erroneous.

The district court found that the City regarded Bridges only as being disqualified from jobs involving "routine exposure to extreme trauma" and that such employment constitutes a "narrow range of jobs." Thus, the district court concluded that Bridges failed to prove that he was disabled under the ADA because the City did not regard him as having a substantially limiting impairment on his ability to work. Bridges appeals, and the United States filed a brief as amicus curiae in support of Bridges' appeal.

Discussion

[1] This case presents mixed questions of law and fact, requiring varying standards of review. *Reich v. Lancaster*, 55 F.3d 1034, 1044-45 (5th Cir. 1995). We review the district court's factual findings only for clear error, while its legal conclusions are reviewed *de novo*. *Id.*

[2] The ADA prohibits discrimination by an employer on the basis of a person's disability. 42 U.S.C. § 12112. Thus, one requirement for a plaintiff to prevail on an ADA claim is to establish that he has a disability. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996). It is undisputed that Bridges suffers from a mild form of hemophilia and that the City refused to hire him as a firefighter because of this condition. What is in dispute is whether Bridges suffers from a "disability" as that term is defined under the ADA.

[3] [4] The statutory definition of "disability" includes "being regarded as having [a physicial or mental impairment that substantially limits one or more of the major life activities]." See 42 U.S.C. § 12102(2)(c).[2] One is regarded as

[2] Bridges does not claim that his mild hemophilia actually substantially limits one or more major life activities. Instead, he asserts that the City regarded him as having a substantially limiting impairment. See 42 U.S.C. § 12102 (2)(C).

having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment. See *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 n. 19 (5th Cir. 1995) (quoting 29 C.F.R § 1630.2(1)(1)-(3)). We analyze Bridges' claim under the first definition of "regarded as"—that his impairment is not substantially limiting but that the City perceived it as such.[3] [FN3] See *Rogers*, 87 F.3d. at 758; *Dutcher*, 53 F.3d at 727 & n. 19 (citing definition set forth in 29 C.F.R. § 1630.2(1)(1)).

[5] Although the ADA does not define "substantially limits" or "major life activities," the regulations promulgated by the EEOC "provide significant guidance." *Dutcher*, 53 F.3d at 726. The EEOC regulations state that "[m]ajor [l]life [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Working is the only major life activity in which Bridges claims the City regarded him as substantially limited. For the major life activity of working, the EEOC regulations provide that

> "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes

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[3] Bridges claims that he falls under the third Equal Employment Opportunity Commission (EEOC) definition of "regarded as"—that he has no impairment at all but that the City regarded him as having a substantially limiting impairment. It is clear, however, that hemophilia is an "impairment." See *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190 n. 1 (5th Cir. 1996) (quoting regulations promulgated by the EEOC defining physicial impairment to include, inter alia, any physiological condition affecting the hemic body system).

> as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

[6] On appeal, Bridges argues that the district court erred by holding that the City regarded him as substantially limited in only a narrow range of jobs. The district court's finding of the City's perception—that Bridges' hemophilia substantially limits him only in jobs involving "routine exposure to extreme trauma"—is a finding of fact subject to clearly erroneous review. We do not understand Bridges to argue that the district court's finding of the City's perception is clearly erroneous. Even if his argument is interpreted to so dispute this finding, there is ample record evidence to support it.[4]

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[4] Bridges does argue that the City misunderstood his mild form of hemophilia and believed that he was subject to spontaneous bleeding. Dr. Wilson testified that he rejected Bridges not because he feared spontaneous bleeding-he did not—but because he believed Bridges was at increased risk for excessive bleeding with any trauma. This belief was supported by Bridges' hematologist. There is a multitude of record evidence regarding the City's belief in the routine and extreme trauma suffered by firefighters. For example, Dwayne Connella, the emergency medical services supervisor for the City's fire department and a career firefighter, testified that when firefighters enter a structure fire, often they are unable to see, hear, or smell, and that they crawl along the walls to maintain a reference point while continuously sweeping their arms and legs in attempts to locate injured victims. He further testified that firefighters must move as quickly as possible to save lives, and, thus, that firefighters trying to locate victims in an atmosphere of no visibility often must "lead with [their] head[s]." The City also presented evidence of specific trauma that its firefighters have sustained. There is evidence that the City's firefighters have fallen through ceilings and floors and from roofs and ladders, have been struck by falling televisions, tables, chests of drawers, bar bells, and ceiling joists, and have been knocked around by an over-pressurized fire hose. And, in contrast to when similar injuries are received in other jobs, the City

[7] We next address the question of whether the district court erred in holding that the limitation as perceived by the City—that Bridges cannot perform any job in which he is routinely exposed to extreme trauma—substantially limits him only in a narrow range of jobs. This is a mixed question of law and fact. The underlying factual question is how many and which jobs involve routine exposure to extreme trauma. On appeal, Bridges lists the following jobs as involving routine exposure to extreme trauma: law enforcement, military service, EMT, paramedic, construction worker, manufacturing and machinery processing jobs, saw mill employees, quarry workers, and jobs in the iron and steel industry. The district court made no explicit findings of fact regarding which jobs, other than firefighting, did or did not involve routine exposure to extreme trauma. Nevertheless, we can rule out most of the jobs listed by Bridges because of a lack of record evidence. Bridges points to no record evidence that law enforcement personnel are routinely exposed to extreme trauma, and we find none. Neither does the record evidence support his contention that construction workers, manufacturing and machinery processing employees, saw mill or quarry workers, employees in the iron and steel industry, or military personnel are routinely exposed to extreme trauma.[5] Nor does the record evidence

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(footnote 4 continued)

presented evidence that firefighters do not have the luxury of seeking immediate medical treatment because every minute courts in saving lives during a fire. Whether or not the actual trauma encountered by firefighters is quite so routine or severe, this is sufficient evidence to sustain the district court's finding of the City's good faith, actual perception that firefighters routinely encounter extreme trauma in their jobs.

[5] Bridges points to testimony by Jack Madley (Madley), who was qualified as an expert safety engineer for the purpose of assessing and comparing

mandate a finding that EMTs and paramedics are routinely exposed to extreme trauma.[6]

(footnote 5 continued)

the risk of firefighting with the risks involved in other jobs, as evidence that these types of workers are routinely exposed to extreme trauma. Madley reviewed the City firefighters' workers' compensation claim records and compared them to national studies. According to Madley, a large number of workers' compensation injuries occurred at the fire station and are not directly related to firefighting. Madley compared the workers' compensation rates of firefighters to higher compensation rates of stone quarry workers, saw mill workers, and iron and steel erection workers. Madley concluded from this data "[t]hat the insurance carriers think that if you work in the iron and steel erection [business] you're in a much more hazardous job than if you're a fire fighter." Even if workers' compensation claims are considered reliable measures of incidents of trauma—and there was evidence that firefighters often do not file compensation claims when they suffer trauma—non of Madley's evidence addressed variations in trauma. For Madley's purposes, no differentiation was made between incidents involving minor trauma and those involving extreme trauma. Consequently, his testimony does not support a finding that any particular job has "routine exposure to extreme trauma." Bridges also points to his own testimony about his experience as a member of a Bradley Fighting Vehicle (BFV) team in the Louisiana National Guard. Bridges testified that soldiers get "bruised and banged and knocked around" a lot while riding in BFVs. He also testified that soldiers who handle the weapon system in BFVs get nicks and bruises on their fingers from loading and unloading the system. This is not evidence sufficient to support a finding that military personnel in general are routinely exposed to extreme trauma. *Cf. Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, ____U.S.____, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994).

[6] Bridges points to testimony by Dwayne Connella and Chief Wallace to support his argument that emergency medical services employees are routinely exposed to extreme trauma. In response to a question about what one does as a firefighter or a driver of the fire truck or as captain of the firefighters, Connella testified that people tend to get banged around inside of a fire truck and in an ambulance. This is not direct evidence of trauma to which EMTs and paramedics are exposed. Chief Wallace testified that emergency medical service personnel are at risk of trauma because they can easily lose their footing while ambulances are in motion. Chief Wallace also testified, however, that the emergency medical

[8] The legal issue presented by the instant case is whether disqualification from jobs involving routine exposure to extreme trauma—such as firefighter—constitutes a substantial limitation on the major life activity of working. Because we agree with the district court that such jobs are merely a narrow range of jobs, we hold that one who is disqualified from holding such jobs is not disabled under the ADA.

[9] The parties focus their arguments on the EEOC regulations. Bridges first argues that the City's perception would substantially limit him in a broad range of jobs. See 29 C.F.R. § 1630.2(j)(3)(i). The City argues that it regards him as limited in only a narrow range of jobs. It is clear that neither firefighters alone, nor even firefighters in conjunction with municipal EMTs and paramedics who must also serve as backup fiirefighters (see note 9, *infra),* constitutes a broad range of jobs of various classes. A "broad range" implies more than two job types. See 29 C.F.R. Pt. 1630.2(j), App. (listing an allergy to a substance found in most high rise office buildings within the plaintiff's geographical area that makes it difficult to breathe as an example of a substantially limiting impairment on a broad range of jobs). This Court has favorably cited *Daley v. Koch,* 892 F.2d 212, 215 (2d Cir. 1989),[7] which held that a perceived impairment that

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(footnote 6 continued)

service environment is more controlled than firefighting because firefighters often have a visibility of merely inches. The dangers described in note 4, supra, are obviously not associated with EMT or paramedic employment per se where not combined with the role of backup firefighter (see note 9, *infra).*

[7] While Daley is a Rehabilitation Act case, not an ADA case, the ADA defines a disability substantially the same as does the Rehabilitation Act. *Chandler,* 2 F.3d at 1391. Consequently, Rehabilitation Act cases are persuasive on questions regarding what constitutes a disability under the ADA.

prevented a plaintiff from becoming a New York City police officer affected only a "narrow range of jobs," even though New York City alone employs over 27,000 police officers. See *Chandler*, 2 F.3d at 1392 & n. 29. Similarly, a limitation that prevents one from becoming a firefighter—or even a firefighter and associated municipal paramedic or EMT backup firefighter—also only affects a "narrow range of jobs."

It is an issue of first impression in this Circuit whether such jobs constitute a "class" of jobs under 29 C.F.R. § 1630.2(j)(3)(i).[8] A class of jobs includes "jobs utilizing similar training, knowledge, skills or abilities, within that geographical area...." See 29 C.F.R. § 1630.2(j)(3)(ii)(B). Bridges and *amicus curiae* argue that exclusion from one's chosen field of employment is a substantial limitation on the ability to work because a chosen field is a "class of jobs." There is some support for this position. The Fourth Circuit has suggested that a plaintiff whose impairment "foreclosed her generally from obtaining jobs in her field" would be substantially impaired. *Gupton v. Commonwealth of Virginia*, 14 F.3d 203, 205 (4th Cir.), cert. denied, ____U.S.____, 115 S.Ct. 59, 130 L.Ed.2d 17 (1994). But this language was dicta

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[8] Bridges did not argue to the district court or in his initial brief in this Court that firefighting, or firefighting plus paramedics and EMTs, is a "class of jobs." The amicus curiae first raised the issue in its initial brief. To the extent that this "class of jobs" argument presents us a purely legal issue, we hold that Bridges has not waived this variation on his legal argument that the district court erred in holding that the City did not regard him as substantially limited in his major life activity of working. See *Carmon v. Lubrizol Corp.*, 17 F.3d 791, 794 (5th Cir. 1994) (noting that issues should be liberally construed); *Corrosion Proof Fittings v. Environmental Protection Agency*, 947 F.2d 1201, 1208 (5th Cir. 1991) (court can consider different arguments raised by amicus curiae on issues raised by appellant). But to the extent Bridges complains about any lack of specific findings or lack of specific evidence directed to the "class of jobs" question, his failure to raise that below waives any such complaint.

because the plaintiff in Gupton was prevented from proving a substantial impairment by the fact that she was offered a similar position (highway utilities specialist) by the state in another office. Id.; see also *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1126 (11th Cir. 1993) (assuming in dicta that fire department's "no-beard rule" substantially limited the ability of people with a certain skin condition to work as firefighters); *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (suggesting in dicta that an employer regards an employee as substantilly impaired under the Rehabilitation Act if the impairment generally prevents employment in his chosen occupation of utility repairman); *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088, 1101 (D.Haw.1980) (asserting in dicta that if an applicant is disqualified from an entire field, such disqualification constitutes a substantial handicap to employment under the Rehibilitation Act).

The Tenth Circuit addressed a similar question in *Welsh v. City of Tulsa, Oklahoma*, 977 F.2d 1415, 1416-1420 (10th Cir. 1992) (Rehabilitation Act case). The Court in Welsh stated that the plaintiff failed to show that he was substantially limited in a major life activity merely because he could not work as a fireman. Id. We find Welsh persuasive: firefighters alone do not constitute a "class of jobs."[9] See also *Chandler*, 2 F.3d at 1393; *Daley v. Koch*, 892 F.2d 212, 215-16 (2d Cir. 1989); but see *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1125-27 (11th Cir. 1993) (assuming in dicta, without

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[9] There is no discussion in Welsh, however, of being excluded from an entire class of jobs; it merely discusses being excluded from the particular job of firefighter. *Id.* We also recognize that Welsh is distinguishable from the instant case because the plaintiff's impairment (decreased sensations in two fingers) in that case was not alleged to have any effect on any job other than actual firefighter. *Id.* Here, it is clear that disqualification from

discussing the issue, that those desiring to be firefighters would be substantially impaired in a major life activity if they were prevented from working as firefighters).

[10] Similarly, the Tenth Circuit has suggested that preemption from employment in one's chosen field does not per se establish a substantial limitation on working. See *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (1994) (applying Rehabilitation Act precedent that "working" as a major life activity "does not necessarily mean working at the job of one's choice"); see also Welsh, 977 F.2d at 1418-19 (plaintiff not substantially limited where sensory deficit prevented him from becoming fireman); *Daley*, 892 F.2d at 215-16 (person not substantially limited in major life activity of working merely because he is prevented from working as a police officer); *cf. Tudyman v. United Airlines*, 608 F.Supp. 739, 745-46 (D.C. Cal. 1984) (concluding that weight problem that prevents plaintiff from working as a flight attendant for particular airline does not substantially limit the major life

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(footnote 9 continued)

the jobs of EMT and paramedic with the City because the City has a rule requiring all EMTs and paramedics to be firefighters as well. The amicus curiae argues in substance that this rule should be imputed to all employers. The City's rule, however, is not based on any perception that Bridges' impairment prevents him from working as an EMT or paramedic. The record shows that the rule was implemented for two reasons: the City (1) wants these people to serve as backup firefighters, and (2) belives that the Fair Labor Standards Act allows employers to require firefighters (and EMTs and paramedics who are also firefighters) to work 56-hour weeks without overtime pay. There is no evidence that EMts or paramedics generally must be firefighters, and, in fact, Bridges is currently employed as an EMT. Because it is not based on the City's perception of Bridges' impairment, we will not impute the City's rule-based disqualification form working for it as an EMT and paramedic to other employers.

activity of working).[10] We find the approach of the Tenth Circuit closer to our understanding of a substantial limitation on the major life activity of working. Thus, we hold that firefighting jobs—including firefighters and associated municipal paramedics or EMTs who must also serve as backup firefighters—is too narrow a field to describe a "class of jobs" under 29 C.F.R. § 1630.2(j)(3)(i).[11]

Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment in favor of the City.

AFFIRMED.

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[10]The appendix to the regulations is unclear on this point. Compare 29 C.F.R. Pt. 1630.2(j), App. (discussing what constitutes a "class of jobs" and giving example of one who cannot perform any heavy labor); to *Id.* (noting that professional baseball player who can no longer play because of injured elbow is not substantially limited in his ability to work); to *id.* stating that one who could not work as commercial airline pilot but who could work as commercial airline co-pilot is not substantially impaired).

[11] We reject Bridges' two other arguments, as well. First, we disagree that hemophilia is a disability per se. The appendix to the ADA regulations emphasizes individualized determinations of disability. 29 C.F.R. Pt. 1630.2 (j), App. ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment that person has, but rather on the effect of that impairment on the life of the individual."). While this interpretive guideline to the ADA indicates a few diseases that constitute ADA disabilities per se (i.e. HIV and insulin-dependent diabetes), hemophilia is not listed. *Id.* This failure to list hemophilia as a disability per se, combined with the focus on individualized assessments, leads us to the conclusion that hemophilia is not a disability per se under the ADA. Second, we note that for Bridges to prevail on his claim that the City acted on "myths, fears, and stereotypes," he would still need to prove that the City regarded him as substantially disabled. See 29 C.F.R. Pt. 1630.2(1), App. (discussing myths, fears, and sterotypes as potentially disabling under the "regarded as" prong of the definition of disabled).

APPENDIX B

THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

FILED
JUN 30 1995

CORTEZ T. BRIDGES

versus CIVIL ACTION NO. 94-0382

CITY OF BOSSIER CITY JUDGE STAGG

MEMORANDUM RULING

This court presided over a bench trial in this matter on May 10-12, 1995. The parties submitted their closing arguments in post trial memoranda. For the reasons set forth below, JUDGMENT in favor of the DEFENDANT is GRANTED.

I. FACTS

This suit stems from the defendant's ("the City") rejection of plaintiff's ("Mr. Bridges") application for employment as a fire fighter. Plaintiff filed suit under both the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973. Mr. Bridges suffers from a blood clotting disorder known as Factor IX, a mild form of hemophilia. The City rejected plaintiff because it feared his condition rendered him a danger to himself and others if employed as a fire fighter. At trial, the City repeatedly cited his potential for

excess bleeding secondary to trauma as the source of this danger.

A. MR. BRIDGES

Plaintiff has led a normal, active life, apparently unhindered by his blood condition. He participated in athletics and played in the school band throughout high school. He graduated from high school in 1991 and enrolled in a junior college. His condition has not prevented Mr. Bridges from holding numerous jobs over the years. Throughout high school, he held various part time jobs. While attending junior college, he obtained certification as an Emergency Medical Technician and has since worked as an EMT at a local casino. Plaintiff's service in the National Guard further suggests the blood condition's limited impact. Plaintiff joined the National Guard shortly after his high school graduation. As a National Guard member, he has successfully completed the initial boot camp and successive summer training exercises without incident. Mr. Bridges currently serves the National Guard as the commander of a Bradley fighting vehicle.

B. HEMOPHILIA

The human body reacts to injury by fostering clots in the blood which reduce its flow. Hemophilia is a deficiency in this clotting ability. There are three types of hemophilia; Severe, moderate and mild. The most common is severe hemophilia, in which an individual has 1% or less of the normal person's clotting ability. A moderate hemophiliac has 1-5% of the normal person's clotting ability. A mild hemophiliac such as plaintiff has more than 5% of the normal clotting ability.

While hemophilia itself remains a rare disease, mild

hemophilia is the rarest form of the condition. Mild hemophiliacs, unlike severe hemophiliacs, do not suffer from spontaneous bleeding - bleeding in the joints resulting from no apparent trauma. Mild hemophiliacs face a risk of increased bleeding secondary to trauma. Two common treatments for mild hemophilia are Amicar and Factor IX concentrate. Amicar, a prescription narcotic, prevents the dissolution of any clots previously formed in the blood. It does not stop bleeding. Patients suffering from Factor IX deficiency use Factor IX concentrate to increase their factor levels and thus help clots form after exposure to major trauma or in conjunction with major surgery.

C. MR. BRIDGES' MEDICAL HISTORY

Mr. Bridges has required hospital treatment on at least six occasions, five of which occurred during childhood. At 23 months, he underwent a hydrocele operation without any bleeding complication. At age 13, he fell off his bicycle and bruised his shin. The treating physician prescribed Amicar as a precaution but the expert witnesses disagreed as to whether the swelling was greater than normally expected for such an injury. During adolescence, he injured a nailbed while playing baseball, again without abnormal bleeding. Also during his school years he sprained an ankle, resulting in swelling and a cast. As a precaution, the treating physician administered Amicar. Though the experts diagreed, the evidence failed to establish that his blood condition exacerbated the swelling. In high school, a cut in the forehead required several stitches. Shortly thereafter, plaintiff developed a large bruise which had to be drained. This time an intervening cause eliminated the court's ability to conclude that his condition caused the hematoma. Finally, as an adult, plain-

tiff underwent a hernia operation in 1993. As a precaution, his hematologist administered factor IX concentrate and attended the surgery. Plaintiff did not bleed excessively, nor is there conclusive evidence that he would have absent the use of concentrate.

II. LAW AND ANALYSIS

A. Rehabilitation Act.

Plaintiff sued under both the ADA and the Rehabilitation Act. As both Acts define disability in substantially the same terms, cases decided under the Rehabilitation Act are valid precedent for cases brought under the ADA. *See Chandler v. City of Dallas,* 2 F.3d 1385, 1391 (5th Cir. 1993). The primary distinction between the two Acts is that the Rehabilitation Act applies only to federal government agencies, federal contractors, and recipients of federal funding. 29 U.S.C. § 791, 794; *Dutton v. Johnson County Bd. of County Comm'rs,* 859 F. Supp. 498 (D. Kan. 1994). Plaintiff failed to prove that the City received such funding; the Rehabilitation Act claim fails.[1]

B. Americans with Disabilities Act.

The ADA prohibits employment related discrimination against individuals with disabilities. 42 U.S.C. § 12112(a). The Fourth Circuit has recently summarized the elements of an ADA claim as follows: (1) plaintiff has a disability; (2) he is otherwise qualified for the employment in question;

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[1] Given this Court's determination that plaintiff was not disabled, the claim would fail even with proof of federal funding.

(3) he was excluded from the employment based solely on the basis of the disability. *Doe v. Univ. of Md. Medical System Corp.*, 1995 WL 139893 (4th Cir. Apr. 3 1995). Therefore, this court must first determine whether plaintiff sufers from a disability as defined by the Act.

The ADA states simply:

The term "disability" means—

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

29 U.S.C. § 12102(2).

Major life activities include woking. 29 C.F.R. 1630.2(h)(2)(i). An employer's belief that an employee is unable to perform one task without an adequate safety margin does not, however, establish that the employer regards the employee as having a substantial limitation on his ability to work in general. *Chandler v. City of Dallas*, 2 F. 3d 1385, 1392 (5th Cir. 1993). The inability to perform one particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(i); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Circuit 1994); *Byrne v. Board of Education, School of West Allis*, 979 F.2d 560, 564 (7th Cir. 1992). The Fifth Circuit has gone even further, holding that an impairment which affects only a narrow range of jobs does not impose a substantial limitation

on the major life activity of working. *Chandler v. City of Dallas*, 2 F.3d 1385, 1392 (5th Cir. 1993). Indeed, the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to a substantial limitation on the activity of working. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995).

Plaintiff does not contend he has a physical impairment, eliminating the first two means of proving disability. Instead, plaintiff argues that the City perceived him as having such a disability pursuant to 29 U.S.C. § 12102(2)(C). The Code of Federal Regulations gives three ways an individual may satisfy the definition of being regarded as having such an impairment.

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantial limiting impairment;
>
> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
>
> (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment. 29 C.F.R. Part 1630, App. — § 1630.2(1).

Plaintiff's argument, that the City rejected him because it perceived him as disabled, falls under the third prong. Plaintiff contends that the City believed him to suffer from a moderate or severe form of hemophilia and denied him a

job because of this misunderstanding.[2]

The legal definition of disability, however, turns not on whether the City misunderstood plaintiff's ailment but on whether the City regarded plaintiff as having a substantially limiting impairment. Plaintiff's perception argument asumes the City acted because it considered his condition *substantially limiting.* The facts suggest otherwise. The evidence demonstrated that the City acted because it considered his condition prevented plaintiff from working in the one position he sought, firefighter.

The City argues that it considered plaintiff incapable of performing only this one position. While it is true that the City only considered firefighting, the City's argument would also preclude plaintiff from employment in other fields with extremely high exposure to trauma. But employment with routine exposure to extreme trauma would constitute a narrow range of jobs, and the Fifth Circuit has already found this restriction not to be substantially limiting. In *Chandler,* the court discussed an unpublished case in which an injury prevented a telephone company repairman from climbing telephone poles. *Chandler,* 2 F.3d at 1392, (citing *Elstner v. Southwestern Bell Telephone Co.,* 863 F.2d 881 (5th Cir. 1988)) (unpublished opinion), *aff'd,* 659 F.Supp. 1328 (S.D.Tex. 1987). The court noted that the impairment only disqualified plaintiff from those positions which required climbing, not from working in general. Accordingly, the court found no disability.

In the present case, the City believed plaintiff's bleeding condition disqualified him from the narrow range of jobs

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[2] Plaintiff suffers from only mild hemophilia.

involving routine exposure to extreme trauma. Such a restriction did not impose a substantial limitation on plaintiff's ability to work in general. In fact, he has been employed in other areas since his rejection by the City. Nor did the City's belief in this narrow disqualification render him disabled under the "regarded as" arm of the definition. Therefore plaintiff was not disabled as required by the ADA; he has failed to prove this essential element of the claim and his ADA claim fails.

IT IS THUS ORDERED that JUDGMENT in favor of the DEFENDANT is GRANTED.

THUS DONE AND SIGNED at Shreveport, Louisiana this 30th day of June, 1995.

/s/ Tom Stagg

TOM STAGG
U.S. DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

No. 96-793

In The
Supreme Court of the United States

October Term, 1996

CORTEZ BRIDGES,
Petitioner

versus

CITY OF BOSSIER,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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24 pp

QUESTION PRESENTED FOR REVIEW

Does the single, particular job of firefighter constitute a "class of jobs" such that a perceived disqualification from this single job constitutes a substantial limitation to the major life activity of working?

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No. 96-793

In The Supreme Court of the United States

October Term, 1996

CORTEZ BRIDGES,
Petitioner

versus

CITY OF BOSSIER,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 92 F.3d 329 (5th Cir. 1996). The unreported opinion of the United States District Court for the Western District of Louisiana is reproduced in Appendix B of the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED IN THIS CASE

Americans With Disabilities Act

Title 42, Chapter 126

42 U.S.C. § 12102. Definitions

As used in this Chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111. Definitions

As used in this subchapter:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential,

and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Regulations of the Equal Employment Opportunity Commission

29 C.F.R. § 1630.2(j)(3)(i)&(ii)

(j) *Substantially limits* --

* * *

(3) With respect to the major life activity of *working* --

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in

various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

On March 2, 1994, petitioner filed suit against the City of Bossier City ("the City") under the Americans With Disabilities Act ("ADA"). After a three day trial on the merits and the submission of post-trial briefs, Judge Tom Stagg issued a written opinion dismissing petitioner's ADA claim because petitioner failed to carry his burden of proving that the City regarded him as having a substantially limiting impairment. Because petitioner's failure to prove the threshold element of "disability" was decisive, the trial court properly reserved ruling on the other relevant issues presented by the case.[1]

On July 25, 1995, petitioner timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. In addition to the briefs submitted on behalf of the parties, the United States filed an amicus curiae brief. A panel of the Fifth Circuit affirmed the district court's judgment in favor of the City.

Petitioner timely filed a petition for writ of certiorari.

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[1] *See Immigration & Naturalization Serv. v. Bagamasbad*, 429 U.S. 24, 25-26, 97 S.Ct. 200, 201, 50 L.Ed.2d 190 (1976).

B. Correction of Misstatements in the Petition.

The opinions of the court of appeals and the trial court correctly set forth the facts of this case. In the interest of making this brief truly brief, respondent respectfully directs the Court's attention to the opinions of the appellate court and the trial court.

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements of fact contained in the petition to the Court's attention.

Petitioner misrepresents to this Court both the nature of the work which he sought, and the effect of petitioner's rejection by the City. In direct contrast to petitioner's statement that he "sought work as a paramedic with Bossier City, La.," (see Petition, p.4)[2] both the court of appeals and the trial court correctly found that petitioner applied for the position of firefighter with the City. *Bridges v. City of Bossier*, 92 F.3d 329, 331 (5th Cir. 1996); (Memo.R., Petition, A-13). In fact, petitioner testified that he applied for, and would have only accepted, a job with the Bossier City Fire

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[2] "Petition, p. __" refers to page numbers in the Petition for Writ of Certiorari. "Memo.R., Petition, A-_" refers to the Memorandum Ruling rendered by Judge Stagg on June 30, 1995 which is reproduced as Exhibit B of the Petition for Writ of Certiorari.

Department as a front-line fire fighter. (5/10/95 Tr. 20, 101).[3]

Petitioner also claims that his rejection as a firefighter precluded his employment as a paramedic. (Petition, p.4). In fact, petitioner was employed as a paramedic at the time of the trial in this matter. *Bridges*, 92 F.3d at 335 n.9 (". . . Bridges is currently employed as an EMT."); (Memo.R., Petition, A-14). Rather than precluding petitioner's employment as an EMT and paramedic, his rejection by the City merely precluded him from employment by the City at the single, particular job of firefighter/emergency medical technician.[4]

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[3] "_ Tr. _" refers to pages in the trial transcript for the dates indicated. The transcript for May 11, 1995 was separated into two volumes: a morning session and an afternoon session. The morning session of 5/11/95 will be referred to as "5/11/95 Mrn. Tr. _" and the afternoon session of 5/11/95 will be referred to "5/11/95 Aft. Tr. _."

[4] As noted by the court of appeals, the City has a rule requiring all EMTs to be firefighters. *Bridges*, 92 F.3d at 335 n.9. This rule was implemented for two reasons. First, the City wants all EMTs and firefighters to be dually qualified. In emergency response, the firefighter/EMT will have the training necessary to protect both life and property. Second, the City believes that the Fair Labor Standards Act allows employers to require firefighters (and EMTs who are also firefighters) to work 56-hour weeks without overtime pay. *Id.*

As he did in the lower courts, petitioner continues to allege that he was denied a position as a firefighter without any kind of individualized evaluation of his ability to do the job. (Petition, p.6). The record, however, is replete with evidence of the individualized assessment performed by the City. (5/11/95 Aft.Tr. 29-41, 49, 58-9, 80-88). This argument was dismissed implicitly by the trial court and expressly by the court of appeals. *Bridges*, 92 F.3d at 331 n.1.

Petitioner's argument to this Court is premised primarily upon two factual assertions, both of which are contrary to the findings of the district court (which were affirmed by the court of appeals) and have virtually no support whatsoever in the record. The first of these unsupported factual assertions is that the City perceived petitioner as being unqualified for the positions of EMT and paramedic, as well as firefighting. According to petitioner, "the City regarded Bridges . . . to be unqualified for any line position in the fire department including firefighter, EMT, paramedic or, indeed any position with exposure to trauma." (Petition, p.7).

In fact, the City only perceived petitioner as being unqualified for the single position of firefighting. The trial judge rendered a specific finding of fact with regard to this very issue.

> The evidence demonstrated that the City acted because it considered his condition prevented plaintiff from working in the one position he sought, firefighter.

(Memo.R., Petition, A-19). After reviewing the record, the court of appeals concurred with the trial court, explaining that there was absolutely no evidence that the City perceived petitioner as disqualified to work as an EMT or paramedic. *Bridges*, 92 F.3d at 335 n.9.

Based on this single finding of fact, the trial court concluded that, while the City's perception would also preclude petitioner from employment in any job involving "routine exposure to extreme trauma," such jobs would only constitute a "narrow range of jobs." (Memo.R., Petition, A-19). This fact specific finding was based on the absence of any evidence that even a single job other than that of a firefighter involves "routine exposure to extreme trauma." *Bridges*, 92 F.3d at 333-34 & n.5.

Second, petitioner assumes that employment involving routine exposure to extreme trauma includes any kind of emergency response work. (Petition, p.10 ("The rationale for his disqualification -- exposure to trauma and thus to excessive bleeding -- if applied by other employers would certainly disqualify him from all firefighting, and emergency-response related work.")). However, as noted by the court of appeals, there was no record evidence that law enforcement personnel, EMTs and paramedics, or any other emergency response-related workers are "routinely exposed to extreme trauma." *Bridges*, 92 F.3d at 333-34 & n.5.

Simply stated, the factual basis from which the rulings of the lower courts are based identify only one

job which involves routine exposure to extreme trauma. That job is the singular job described in detail by the lay testimony of the City's firefighter -- the unique job of firefighter/EMT in the Bossier City Fire Department.

Petitioner also complains that the trial judge never reached the "essential question" of whether petitioner's condition in fact disqualified him for the position because the trial court concluded as a matter of law petitioner was not disabled within the meaning of the ADA. (Petition, p.9). First, the threshold question in any case brought pursuant to the ADA is whether the plaintiff is an individual with a disability. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996). The plaintiff has the burden of proving that he has a physical impairment that substantially limits a major life activity. *Heilweil v. Mt. Sinai Hospital*, 32 F.2d 718, 722 (2nd Cir. 1994), *cert. denied*, __ U.S. _ , 115 S. Ct. 1095, 130 L.Ed.2d 1063 (1995); *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1419 (10th Cir. 1992).

Second, in accordance with the admonitions of several appellate courts,[5] the decision of the trial court,

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[5] Whether or not a particular person has an impairment which substantially limits a major life activity or is perceived by a covered entity as having an impairment which substantially limits a major life activity is an individualized inquiry best suited to a case-by-case determination. *Ennis v. National Ass'n Of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385,

rather than a purely legal conclusion, was based on a fact specific individualized inquiry in which the trial court considered whether this petitioner's particular impairment constituted for this petitioner a significant barrier to employment. According to the trial court, the evidence demonstrated that this petitioner had failed to prove that his particular impairment constituted a significant barrier to employment for him.

REASONS FOR DENYING THE WRIT

The decisions of the trial court and the court of appeals rest largely on: (1) the trial court's finding (which was affirmed by the court of appeals) that the City perceived petitioner as being unqualified only for jobs involving routine exposure to extreme trauma; and (2) the absence of any record evidence demonstrating the existence of any job other than that of firefighting which involves routine exposure to extreme trauma. Findings of fact by the trial court, which are affirmed on appeal, present no issue deserving of this Court's attention. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed.2d 672 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent

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1396 (5th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994); *Byrne v. Board of Educ.*, 979 F.2d 560, 564-65 (7th Cir. 1992); *Welsh*, 977 F.2d at 1417.

findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

As thus tried and decided below, this case presented the lower courts with the issue of whether petitioner's limitation as perceived by the City -- that petitioner cannot perform any job in which he is routinely exposed to extreme trauma -- constituted a substantial limitation on the major life activity of working. This issue "is a mixed question of fact and law. The underlying factual question is how many and which jobs involve routine exposure to extreme trauma." *Bridges*, 92 F.3d at 333. As found by the lower courts, the record evidence establishes only that the single job of firefighter involves routine exposure to extreme trauma. *Id.* at 333-34 & n.5.

Under the established facts of this case, two legal issues were presented to the court of appeals. The first legal issue was whether the City's perception that petitioner could not perform any job involving routine exposure to extreme trauma would disqualify petitioner from a "broad range of jobs." See 29 C.F.R. § 1630.2(j)(3)(i).[6] Petitioner does not raise this issue in the instant petition.

The second legal issue, the one in fact raised by the instant petition, is whether the City's perception that petitioner could not perform any job involving routine

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[6] In fact this was the only issue addressed by the trial court.

exposure to extreme trauma would disqualify petitioner from a "class of jobs." See 29 C.F.R. § 1630.2(j)(3)(i). The regulations define a "class of jobs" as those jobs requiring the same "training, knowledge, skills or abilities." 29 C.F.R. 1630.2(j)(3)(ii)(B).

As demonstrated above, there is no record evidence to establish that any job other than that of firefighter involves routine exposure to extreme trauma. Likewise, there is no record evidence establishing what, if any, jobs require "training, knowledge, skills, or abilities" similar to that required of a firefighter.[7] Thus, the legal issue presented to this Court may be succinctly stated as follows:

> Does the single, particular job of firefighter constitute a "class of jobs" such that a perceived disqualification from this single job constitutes a substantial

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[7] The issue of whether the City's perception -- that petitioner could not perform any job involving routine exposure to extreme trauma -- would disqualify petitioner from a "class of jobs" was not raised by the petitioner in the trial court. Accordingly, there is no record evidence concerning jobs involving similar "training, knowledge, skills or abilities." When this issue was first raised by the amicus curiae in its initial brief, the City objected to that the argument as untimely. The court of appeals held that the purely legal issue of whether firefighting -- including firefighters and associated municipal paramedics and EMT's who must also serve as backup firefighters -- constituted a "class of jobs" had not been waived by petitioner.

limitation to the major life activity of working?

The regulations specifically address this very issue. According to the regulations, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). Furthermore, the courts of appeals which have actually addressed this issue are in agreement. *See Bridges*, 92 F.3d at 335; *Wernick v. Federal Reserve Bank Of New York*, 91 F.3d 379, 383-84 (2nd Cir. 1996); *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454-55 (7th Cir. 1995); *Heilweil*, 32 F.3d at 723; *Gupton v. Com. Of Va.*, 14 F.3d 203, 205 & n. 3 (4th Cir. 1994) (in order for plaintiff to establish that he has an impairment that substantially limits his ability to work, he must show more than merely that the impairment barred him from one particular job; *Cook v. State Of R.I., Dept, of MHRH*, 10 F.3d 17, 26 (1st Cir. 1993); *Chandler*, 2 F.3d at 1393 ("An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation in his ability to work in general."); *Byrne*, 979 F.2d at 565; *Welsh*, 977 F.2d at 1417; *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1255, 122 L.Ed.2d 653 (1993); *Miller v. AT&T Network Sys.*, 915 F.2d 1404 (9th Cir. 1990) (adopting district court opinion at 722 F.Supp. 633 (D.Or. 1989); *Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir. 1989);

Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 n.3 (6th Cir. 1985).

Likewise, the courts are in agreement that one is not substantially limited in the major life activity of working even though that single, particular job is "the job of one's choice." *Bridges*, 92 F.3d at 335; *Wooten*, 58 F.3d at 385-86; *Roth*, 57 F.3d at 1454-55; *Byrne*, 979 F.2d at 1417; *Welsh*, 977 F.2d at 1417; *Maulding*, 961 F.2d at 698; *Daley*, 892 F.2d at 215.

Only the Eleventh Circuit has suggested a different result. In *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993), the plaintiffs were barred from serving as firefighters because they had a skin condition that prevented them from shaving, and the fire department had, for safety reasons, a no-beard rule. In dicta, the court stated that the "firefighters would seem to qualify as handicapped individuals" under the Rehabilitation Act because their skin condition "substantially limit[ed their] ability to . . . work on account of the no-beard rule." *Id.* at 1126.

However, the dicta of *Fitzpatrick* has not even been followed by the district courts of the Eleventh Circuit. As observed by one district court:

> The Eleventh Circuit has not made any substantive ruling on whether the inability to perform a specific individualized job amounts to a substantial limitation of a major life activity under the ADA.[1]

> Nevertheless, the Court is persuaded by the opinions of the numerous other circuits which have decided this issue. An impairment that only disqualifies a person from a narrow range of jobs should not be considered substantially limiting.
>
> > 1. *In dicta*, the Eleventh Circuit has stated that the inability to work at a particular job because of an impairment may qualify a person as a handicapped individual. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1126 (11th Cir. 1993). The *Fitzpatrick* decision, however, offers little assistance in determining how the Eleventh Circuit would rule on the case at bar. . . .

Freund v. Lockheed Missiles And Space Co., Inc., 930 F.Supp. 613, 617 (S.D. Ga. 1996).

In summary, this case does not present a legal issue which warrants the commitment of this Court's scarce judicial resources. When petitioner's misstatements of fact are corrected, this case presents a simple straightforward legal issue: Does the perceived inability to perform a single, particular job constitute a substantial limitation in the major life activity of working. More importantly, the answer by the courts of appeals to this legal issue -- that the inability to perform

a single, particular job does ***not*** constitute a substantial limitation in the major life activity of working -- has been unanimous.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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